

***United States Court of Appeals
for the Second Circuit***



APPENDIX

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74-1389

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

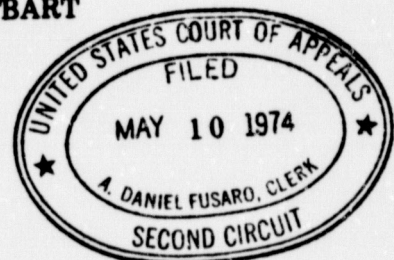
-v-

ERNEST MALIZIA and JOSEPH MALIZIA,
Defendants-Appellants.

**On Appeal From The United States District
Court for The Southern District of New York**

APPELLANTS' APPENDIX

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ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
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Motley, J.

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INDICTMENT

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SAME TITLE

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The Grand Jury charges:

On or about the 12th day of November, 1970, in the Southern District of New York, ERNEST MALIZIA and JOSEPH MALIZIA, the defendants, unlawfully, wilfully and knowingly did receive, conceal, sell and facilitate the transportation, concealment and sale of a narcotic drug, to wit, 915.4 grams of heroin hydrochloride, after the said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law is that the importation and bringing of any narcotic drug into the United States except such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only, is prohibited.

(Title 21, Sections 173 and 174, United States Code; Title 18, Section 2, United States Code)

SECOND COUNT

The Grand Jury further charges:

On or about the 17th day of February, 1970, in the Southern District of New York, ERNEST MALIZIA, the defendant, unlawfully, wilfully and knowingly did receive, conceal,

INDICTMENT

sell, and facilitate the transportation, concealment and sale of a narcotic drug, to wit, approximately 995 grams of cocaine hydrochloride, after the said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and coca leaves as the Director of the Bureau of Narcotics and Dangerous Drugs finds to be necessary to provide for medical and legitimate uses only, is prohibited.

(Title 21, Sections 173 and 174, United States Code)

THIRD COUNT

The Grand Jury further charges:

1. On or about the 1st day of November, 1970, and continuously thereafter up to and including the 30th day of April, 1971, in the Southern District of New York, ERNEST MALIZIA and JOSEPH MALIZIA, the defendants, and others to the Grand Jury unknown, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 173 and 174 of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, wilfully and knowingly would receive, conceal, buy, sell and facilitate the transportation, concealment and sale of a quantity of narcotic drugs, the exact

INDICTMENT

amount and nature thereof being to the Grand Jury unknown, after the said narcotic drugs had been imported and brought into the United States contrary to law, knowing that the said narcotic drugs had been imported and brought into the United States contrary to law in violation of Sections 173 and 174 of Title 21, United States Code.

OVERT ACTS

In furtherance of the said conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the Southern District of New York:

1. On or about November 12, 1970, JOSEPH MALIZIA left the Barnie Google Restaurant, East 86th Street, between Second and Third Avenues, New York, New York.

2. On or about November 12, 1970, JOSEPH MALIZIA opened the trunk to a car at the 86th Street Garage, Inc., 305 East 86th Street, New York, New York.

3. On or about February 17, 1971, ERNEST MALIZIA took possession of a bag containing money at Christine's Luncheonette, 349 Pleasant Avenue, New York, New York.

4. On or about February 17, 1971, JOSEPH MALIZIA delivered a package to a man at Christine's Luncheonette, 349 Pleasant Avenue, New York, New York

(Title 21, Sections 173 and 174, United States Code)

Foreman

WHITNEY NORTH SEYNOUR, JR.
United States Attorney

CHARGE OF THE COURT

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2 THE COURT: Ladies and gentlemen, first of all,
3 I want to thank you for your patience and for your coopera-
4 tion in being prompt and for the careful attention you have
5 given throughout this trial to the testimony and to the evi-
6 dence, as it has come in.

7 Before formally beginning the charge, I would also
8 like to thank counsel on both sides of this case, for their
9 patience with the Court and to congratulate each of them on
10 the high degree of professional skill, which each has demon-
11 strated throughout this trial.

12 I trust that you will bear with me, ladies and
13 gentlemen, and give me that same degree of attention which you
14 have given throughout the trial, so that you may carefully
15 understand the legal principles which you are to apply to
16 the facts in this case as you find them.

17 As you approach the performance of your function
18 in this case, that is, the determination of the guilt or
19 innocence of this defendant, please remember that it is your
20 duty to do so calmly and dispassionately, that is, to weigh
21 the evidence calmly and dispassionately, without sympathy
22 or prejudice for or against either the Government or this
23 defendant.

24 I want to remind you that every defendant appear-
25 ing before this Court, is entitled to a fair and impartial

trial, regardless of his occupation or station in life.

There is only one charge in the indictment and your verdict, which is either guilty or not guilty, as to that charge, must be based solely upon the testimony which you have heard from the witnesses who took the witness stand, any exhibits which have been received into evidence, and any stipulations as to certain facts, which the lawyers entered into, and on nothing else.

I want to point out also the fact that the Government is a party here, that is, that the prosecution is brought in the name of the United States of America, entitles it to no greater consideration than that accorded to any other party to litigation. By the same token, it is entitled to no less consideration. All parties, Government and individuals alike, stand equal before the law.

As you know, you as jurors are the sole and exclusive judges of the facts in this case. That means that you pass on the weight of the evidence and you determine the credibility of the witnesses, that is, the believability of the witnesses who have testified here.

That means also that you resolve such conflicts as there may be in the evidence and you draw such reasonable inferences as may be warranted by the testimony or exhibits or stipulations in the case.

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Again, with respect to any matter of fact, it is your recollection, and yours alone, that governs. Anything that counsel for the Government may have said, anything that counsel for the defendant may have said, or anything that I may have said with respect to any matter in evidence, is not to be substituted by you in lieu of your own recollection as to what the facts are.

That applies also to any fact that I may refer to during the course of these instructions. Also, during the course of these instructions, I may refer to some of the testimony. That doesn't mean that I think that is the most important testimony or the only testimony in the case. In deciding this case you have to consider all the evidence in the case. You have to consider all the testimony, both direct and cross examination.

My function is to instruct you as to the law applicable to this case and you should accept the law as I state it to you in these instructions and apply it, as I have said, to the facts as you find them.

Now, the logical result of that application certainly is a verdict in the case. As we have already pointed out, I think Government counsel and defense counsel have, and I will now point it out, that this is an important case to both the Government and defendant, and therefore since it

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2 is an important case, it must be decided.

3 You are not to single out any one instruction
4 alone as stating the law, but you have to consider these
5 instructions as a whole.

6 You are not to assume that I have any opinion to
7 the guilt or innocence of this defendant or as to the truth
8 or falsity of any of these charges.

9 In the Federal Court, a Judge is permitted to
10 comment upon the evidence, but I am not going to do that; I
11 am going to leave it entirely up to you.

12 If during the course of the trial a question was
13 asked, and an objection interposed, and I sustained the
14 objection, you are to disregard the question and any alleged
15 facts contained in the question.

16 Similarly, if I ruled that an answer be stricken
17 from the record, you are to disregard both the question and
18 the answer in your deliberations.

19 As you well know, the defendant has entered a
20 plea of not guilty to this charge. Consequently, if the
21 defendant is to be convicted, the Government has the burden
22 of proving that the defendant is guilty beyond a reasonable
23 doubt. That is a burden which never shifts. It remains
24 upon the Government throughout the entire trial, as I told
25 you before. A defendant doesn't have to prove his innocence.

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2 On the contrary, he is presumed to be innocent of the accu-
3 sations contained in an indictment. This presumption of
4 innocence, as I have said, was with him when the trial
5 started, continued with him throughout the trial, is with
6 him as I instruct you now, remains with him even when you
7 retire to the jury room to deliberate. This presumption
8 of innocence is removed only if and when, as a result of your
9 deliberations in the jury room, you are convinced that the
10 Government has sustained its burden of proof, and that is,
11 to prove the defendant guilty beyond a reasonable doubt.

12 Now, the question which naturally comes up is,
13 what is reasonable doubt. The words almost define themselves.
14 Reasonable doubt is a doubt founded in reason and arising
15 out of the evidence in the case or the lack of evidence.
16 It is a doubt which a reasonable person has after carefully
17 weighing all the evidence, the kind of doubt which would
18 make one hesitate to act. It means a doubt that is sub-
19 stantial and not merely shadowy.

20 A reasonable doubt is one which appeals to your
21 reason, your judgment and your common sense and your experi-
22 ences in life. It is not caprice, whim or speculation.
23 It is not an excuse to avoid the performance of an unplea-
24 sant duty. It is not sympathy for a defendant.

25 If after a fair and impartial consideration of

1 all the evidence, you can candidly and honestly say that you
2 are not satisfied of the guilt of this defendant and that
3 you do not have an abiding conviction as to this defendant's
4 guilt, such a conviction as you would be willing to act
5 upon unhesitatingly in important and weighty matters in the
6 personal affairs of your own life. then you have a reasonable
7 doubt, and in that circumstance, it is your duty to acquit
8 this defendant.
9

10 On the other hand, if after such a fair and im-
11 partial consideration of all the evidence you can candidly
12 and honestly say that you are satisfied of the guilt of this
13 defendant, that you do have an abiding conviction of this
14 defendant's guilt, such a conviction as you would be willing
15 to act upon unhesitatingly in the important and weighty
16 matters in the personal affairs of your own life, then you
17 have no reasonable doubt and in that circumstance you may
18 convict this defendant.

19 A reasonable doubt does not mean a positive
20 certainty beyond all possible doubt. It is practically
21 impossible for a person to be absolutely and completely
22 convinced of any controverted fact, which by its nature is
23 not susceptible to mathematical certainty. In consequence,
24 the law in a criminal case is that it is sufficient if the
25 guilt of a defendant is established beyond a reasonable

doubt, not beyond all possible doubt.

As I have told you, you as the jurors are the sole judges of the credibility of the witnesses and the weight their testimony deserves.

You know, of course, that there is no automatic way to determine who is telling the truth and who is not. Credibility can be equated with believability and reliability. If a witness is credible, you say he is believable and reliable. If he is incredible, you say he is unbelievable. There is nothing mysterious about these words.

By what yardstick are you to judge the credibility of the witnesses? Each of you has given careful attention to the testimony as it came from the witnesses themselves, you observed the witnesses. Issues of fact are presented for your determination and, to a large extent, the resolution of them depends upon the credibility of the witnesses and the support or lack of support they received from other credible evidence in the case.

Your duty is to decide the disputed issues of fact. Use your logic, your reason and your common sense and don't be sidetracked or diverted or distracted by what you consider to be a minor or insignificant detail or irrelevance, or by what you consider to be an appeal not to your reason or logic but to mere sentimentality or unthinking

passion. I repeat: Use your common sense.

You should carefully scrutinize all the testimony given, both direct and cross examination, the circumstances under which each witness has testified and every matter in evidence which tends to show whether the witness is worthy of belief.

Consider each witness' intelligence, motive and state of mind and demeanor and manner while on the witness stand.

Consider the witness' ability to observe the matters as to which he has testified and whether he impresses you as having an accurate recollection of those matters.

Consider also any relationship each witness may bear to either side of the case, the manner in which each witness might be affected by the verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or transaction may see or hear it differently and innocent misrecollection, like failure of recollection, is not an uncommon experience.

In weighing the effect of a discrepancy, always

consider whether it pertains to a matter of importance or an unimportant detail and whether the discrepancy results from innocent error or intentional falsehood.

In determining credibility and weight to be given to the testimony of any witness, you must also consider the testimony of the Government witness. The mere fact that they are employees of the Government entitles them to no more and no less consideration than any other witness.

Nor should you be influenced by the number of witnesses a side has called or the number of documents received in evidence, because it is the quality of the testimony and other evidence which counts, not the quantity.

After making your own judgment, you will give the testimony of each witness such credibility, if any, as you think it deserves.

If you find that any witness, and this applies to all witnesses who testified here, has wilfully testified falsely as to any material matter, you may reject the entire testimony of that witness, or you may accept such part or portion as commends itself to your belief or which you find corroborated by other evidence in the case.

There are two kinds or classes of evidence recognized and accepted in courts of justice upon either of

adequate and convincing basis for finding that the defendant acted knowingly, wilfully and intentionally.

The actions of a person, therefore, must be set in their time and place, just as the full meaning of a word is commonly understood only in relation to other words in a sentence or in its context. So the meaning of a particular act or conduct may depend on the circumstances surrounding that act or conduct.

In other words, circumstantial evidence is of facts proved from which the jury may infer by a process of reasoning other facts. It is not necessary that the participation of a defendant be shown by direct evidence. The connection may be inferred by such facts and circumstances in evidence as legitimately tend to sustain that inference.

As I told you when you were being selected and before the trial commenced, an indictment is not proof or evidence, it is merely an accusation or a technique or method whereby persons accused of a crime are brought into court and then their guilt or innocence is determined by a trial jury such as you are.

Therefore the indictment in this case has no evidentiary value and should not be considered by you as proving or tending to prove any crime which is charged in it.

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As you know, the indictment contains one charge and what I am going to do now is to read that one charge to you and then tell you the essential elements of the crime, that is, what the Government must prove to your satisfaction beyond a reasonable doubt before you could find this defendant guilty. Of course, if you find that the Government has failed to prove anyone of these essential elements, then you must acquit the defendant.

Now, Count 2 reads as follows:

"On or about the 17th day of February, 1971, in the Southern District of New York, Ernest Malizia, the defendant, unlawfully, wilfully and knowingly did receive, conceal, sell and facilitate the transportation, concealment and sale of a narcotic drug, to the witness, approximately 995 grams of cocaine hydrochloride, after said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and cocoa leaves, as the Director of the Bureau of Narcotics and Dangerous Drugs find to be necessary to provide for medical and legitimate use only, is prohibited."

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Now, the indictment cites a Federal Statute which it is claimed the defendant violated, and that is Title 21, United States Code, Section 173 and 174.

Now, those statutes provide, in pertinent part, as follows:

"It is unlawful to import or bring any narcotic drug into the United States except such amounts as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate use. Whoever fraudulently or knowingly imports or brings in narcotic drugs into the United States or any territory under its control or jurisdiction contrary to law or receives, conceals or in any manner facilitates the transportation or concealment of any narcotic drug after being imported or brought in knowing same to have been imported or brought into the United States contrary to law, shall be guilty of a crime."

In order to convict this defendant of the crime charged in this indictment, you must find that the Government has proved beyond a reasonable doubt each of the five following elements, first, that on or about the date charged in the indictment, that is, February 17, 1971 here in the Southern District of New York, the defendant received or concealed or facilitated the transportation or concealment of a narcotic drug;

Second, that this defendant committed such acts unlawfully, wilfully and knowingly;

Third, that the substance which has been received in evidence as Government's Exhibit 5, is in fact a narcotic drug;

Fourth, that this drug was unlawfully imported into the United States and;

Fifth, that the defendant knew this drug had been illegally imported into the United States.

As I have said, the first element of the crime is that the defendant either received or concealed or in any manner facilitated the transportation or concealment of a narcotic drug.

As to this element, you are instructed that it is not necessary for you to find defendant did all those prohibited acts. If you are convinced beyond a reasonable doubt that the defendant did any one of those acts and you find that the other four elements of the crime charged have been established beyond a reasonable doubt, then you may convict the defendant.

Concealment means, of course, a hiding of keeping from view. To facilitate means to make easy or less difficult. Therefore, to facilitate in any manner the transportation or concealment of a narcotic drug means wilfully

to do any act which makes less difficult in any way the concealment or transportation of a narcotic drug.

Now, there was testimony from Government witnesses who testified here before you that on February 17, 1971 at about 9:15 p.m., they observed this defendant take possession of a brown paper bag containing previously recorded Government funds at Christine's luncheonette on Pleasant Avenue, here in Manhattan, and then take possession of a package and place that package under the coat of an alleged informant by placing the package between the small of the informant's back and his belt and then pulling down the informant's three-quarter length coat to conceal the package, and that package has been received in evidence as Government's Exhibit 5.

Now, as to the second element, in order to convict the defendant, you must find beyond a reasonable doubt that he acted unlawfully, knowingly and wilfully.

Unlawfully obviously means contrary to law. An act is done knowingly if it is done voluntarily and purposely and not because of mistake, accident, mere negligence or other innocent reason.

An act is done wilfully and is done knowingly deliberately and with an evil motive or purpose.

In determining whether a defendant has acted

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wilfully, it is not necessary for the Government to establish that the defendant knew that he was breaking any particular law or any particular rule. Knowledge and wilfulness of a defendant, as I have said, need not be proved by direct evidence. Like any other fact in issue, it may be established by circumstantial evidence.

With respect to the third element, I charge you as a matter of law, that cocaine hydrochloride is a narcotic drug as defined by the statute.

The parties here have stipulated that a Government chemist, if called as a witness, would have testified that the substance contained in Government's Exhibit 5 is in fact cocaine hydrochloride. Of course, the defendant has not stipulated as to the truth of that testimony, he has only stipulated that if the chemist actually came to court he would so testify. Therefore, you must also find beyond a reasonable doubt that the substance is in fact cocaine hydrochloride before you can find that the third element has been established.

In this connection, I would also like to call your attention to the fact that the indictment specified a certain number of grams, 995 grams, of cocaine. In that connection I want to point out that the evidence in the case need not establish the exact amount, which is alleged in the indictment, but only that some measurable, but sub-

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stantial amount of a narcotic drug was in fact found to be
the substance of Government's Exhibit 5.

Now we come to the fourth and fifth elements of the government's proof. It will doubtless occur to you that the government has offered no direct evidence to establish illegal importation of the cocaine and has not offered any evidence as to defendant's knowledge that the cocaine was imported or brought into the United States contrary to law. The reason for this is that the government is permitted by law to rely upon two permissible inferences as to these two elements. Although the evidence is not sufficient to persuade you beyond a reasonable doubt that each of the elements necessary to establish a violation of the statute is present, you are entitled to infer from the fact of a defendant's possession of a large quantity of cocaine that the drug was, one, illegally imported, and, two, that the defendant knew it had to have been illegally imported.

Of course, you are also entitled under law to infer that the cocaine was not illegally imported. Also, if you find that the cocaine was illegally imported, you are entitled to infer that the defendant did not know it had been illegally imported. In short, you may make the inferences requested by the government although you, as the jury, are not required to draw these inferences. You may draw these inferences unless the evidence in the case provides you with a satisfactory explanation of the defendant's possession

a large quantity of cocaine.

In other words, if the government demonstrates beyond a reasonable doubt that the defendant had possession of what is in fact a narcotic drug and all the other evidence in the case does not reveal a satisfactory explanation of this possession, you may infer the necessary further elements for a violation, although you are not required to draw these inferences.

Now, these inferences do not change the fundamental rule that a defendant in a criminal case is presumed innocent until proved guilty beyond a reasonable doubt, nor does it impose upon the defendant any burden or duty to produce proof that the narcotic drug was lawfully imported or any other evidence.

As previously stated, the burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of the crime charged and the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Now, in connection with any explanation offered for possession of a narcotic drug, you are reminded that in the exercise of constitutional rights, as I have said, the accused need not testify. Possession may be explained to the satisfaction of the jury through other circumstances and other

evidence in the case independent of the testimony of an accused.

Whether you draw the inference to establish the element of illegal importation is up to you, drawing upon your own knowledge, common sense and worldly experience.

The same applies to the inference relating to the defendant's knowledge that there was illegal importation.

Now I want to say a further word about this fifth element, that a defendant knew the drug had been illegally imported into the United States. As to this element, again, you can, but you need not, infer that the defendant had knowledge of the illegal importation of the drug once you find that a defendant unexplainedly had possession of the drug. It is reasonable to infer that one who unexplainedly possesses or deals in large quantities of cocaine would probably know its source or at least would know that it was smuggled into the country from somewhere outside the country.

Finally, I want to say a word as to the basis for authorizing jurors to draw the inference, that is, the inference that the cocaine was illegally imported and that defendant knew it was illegally imported. Recent official investigations and Congressional findings indicate that much more cocaine is lawfully produced in this country than i

1 smuggled into this country. However, the amount of cocaine
2 stolen from domestically produced sources is but a signifi-
3 cantly minor quantity in comparison to the amount of cocaine
4 illegally imported and inasmuch as the average theft is only
5 nine grams the creation of a rebuttable inference that in
6 the absence of explanation of the possession of a large
7 quantity of cocaine -- in the absence of an explanation by
8 the defendant, I should say, of the possession of a large
9 quantity of cocaine -- makes it clear that the inference is
10 imported and this inference is therefore deemed a rational
11 one.
12

13 There has been testimony with respect to the use
14 of a person referred to as the informer by government
15 narcotics agents in this case. I would like to point out
16 that the services of informants are available or are availed
17 of by government agents at times to make narcotics purchases
18 and to obtain introductions to persons suspected of violating
19 the narcotics laws, so that the agents themselves can make
20 undercover purchases. Violations of the narcotics laws are
21 the type of crime where without the use of informants
22 detection would be extremely difficult.

23 The law from time immemorial has permitted the
24 use of informers, provided the rights of a defendant are not
25 violated. Whether or not you approve of the use of an informant

ant in an effort to detect law violation is not to enter into your deliberations and you are not being called upon to approve or disapprove the use of informants.

The defendant has not taken the stand and, as I pointed at the very beginning of the case, a defendant does not have to prove his innocence. The fact that a defendant, who has a right to do so, has not taken the stand and testified in the case does not create any presumption against him and cannot be considered by you on any evidence or any basis for any inference unfavorable to him.

You must not permit such fact to weigh in the slightest degree against the defendant, nor should it enter into your discussions or deliberations. As stated before, the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

The government has introduced evidence that the defendant could not be found when agents sought to arrest him on or about, I think it was, February 25, 1971, and they have introduced evidence that surveillance teams were established at his home, to no avail.

The government also introduced evidence that the defendant was arrested twice under false names during his disappearance.

Now, the defendant is not on trial for fleeing after the alleged incident. However, the flight of a defendant because he knows he has been indicted or believes he will be indicted is a fact which if proved may tend to prove consciousness of guilt on the part of the defendant and may be considered and weighed by the jury in connection with all the other evidence in the case. Whether or not evidence of flight shows a consciousness of guilt and the significance, if any, to be attached to such circumstances are left to your determination. The flight of a defendant does not create a presumption of guilt but is merely a fact to be considered by you together with all the other evidence in determining the guilt or innocence of this defendant. Flight of a defendant would be some evidence of guilt only if you find the defendant knew he had been indicted or believed he would be indicted.

In your consideration of the evidence of flight, you should consider that there may be reasons for this which are fully consistent with innocence. These may include fear of being apprehended, unwillingness to confront the police or reluctance to appear as a witness.

Let me suggest also that a feeling of guilt does not necessarily reflect actual guilt.

The defendant is not on trial here for using a

false name or for a traffic license violation. However, if you find beyond a reasonable doubt that the defendant used a name other than his own in order to avoid subsequent identification, that would be a fact from which you may, but need not, infer a consciousness of guilt on his part and a fact which may be considered by you along with all the other evidence in the case.

I would also like to instruct you that there is no presumption against the defendant or the defendant's failure to call a witness when it appears that his testimony would be merely cumulative or repetitious and of no greater value than that of witnesses who have already testified.

The jury is not to consider or in any way speculate about the punishment which a defendant may receive if he is found guilty. The function of a jury is to determine the guilt or innocence of a defendant on the basis of the evidence in the case and the Court's instructions as to the law. Then it is up to the Court, or the judge alone, to determine what the sentence shall be if there is a conviction.

The most important part of this case, ladies and gentlemen, is the part which you are now about to play, because it is for you and you alone to determine whether this defendant is guilty or not guilty. I know you will try the issues that have been presented to you according to your oaths.

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which you took as jurors, and in that oath you promised you would well and truly try the issues joined and a true verdict render.

I suggest to you that if you follow that oath and try the issues without combining your thinking with any emotions, you will arrive at a true and just verdict.

Now, it must be clear to you that once you get into an emotional state and let fear or prejudice or bias or sympathy interfere with your thinking, you will not arrive at a true and just verdict.

As you deliberate, ladies and gentlemen, please be careful to listen to the opinions of your fellow jurors as well as to ask for an opportunity to express your own views. No one juror holds the center stage in the jury room and no one juror controls or monopolizes the deliberations.

If after listening to your fellow jurors and after stating your own view you become convinced that your view is wrong, do not hesitate because of stubbornness or pride of opinion to change your view, if you become convinced your original view was wrong.

On the other hand, do not surrender your honest conviction solely because of the opinion of your fellow jurors or because you are outnumbered.

Now, because this is a federal court, your verdict

1 9rmd
2 in this case must be unanimous. It must reflect the con-
3 scientious conviction of each and every one of you.

4 Will counsel please approach the bench.

5 (At the side bar.)

6 THE COURT: Mr. Goldberger, do you have any
7 exceptions to the charge?

8 MR. GOLDBERGER: Judge, first of all, I object --

9 THE COURT: I said I would let you put that on
10 afterwards.

11 MR. GOLDBERGER: During the Court's charge your
12 Honor stated that since this is an important case to both
13 sides it must be decided. I think that charge is improper
14 and incorrect and I except to that.

15 I also except to your Honor giving the jury any
16 numerical figures, as to nine grams of cocaine, as to that
17 aspect of the charge on the question of presumption regarding
18 importation. I object to your Honor's portion of the charge
19 regarding the informant. I thought that portion of the
20 charge led the jury to believe it was almost necessary for
21 the government to use informants in narcotics cases.

22 THE COURT: Do you have any exceptions?

23 MR. LITTLEFIELD: No, your Honor.

24 (In open court.)

25 THE COURT: Before the jurors actually go in, we

M. S. V. Maliza

AFFIDAVIT OF PERSONAL SERVICE

**STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:**

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 10 day of *May*, 1974 at No. *Foley B. INTL* deponent served the within *affidavit* upon *M. S. V. Maliza* the *appellee* herein, by delivering a true copy thereof to *h* personally. Deponent knew the person so served to be the person mentioned and described in said papers as the *appellee* therein.

Sworn to before me,
this 10 day of *May* 1974

Edward Bailey
.....
Edward Bailey

William Bailey
.....

WILLIAM BAILEY

Notary Public, State of New York

No. 43-0132945

Qualified in Richmond County

Commission Expires March 30, 1975

